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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Petitioner,

vs.

ALLAN BAKKE,

Respondent.

BRIEF AMICUS CURIAE OF THE LAW SCHOOL ADMISSION COUNCIL IN SUPPORT OF PETITIONER THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

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The Law School Admission Council submits its brief, *amicus curiae*, with consent of the parties, to support the petitioner and to urge reversal of the judgment below, reported at 18 Cal.3d 34, 553 P.2d 1152 (1976).

INTEREST OF THE AMICUS

The limited purpose of the Law School Admission Council is to assist the Court by inviting attention to information and to considerations not addressed in the opinions below, to place the issue in perspective. While the immediate controversy involves a medical school, the Court's action will directly affect the nation's law schools as well.

This brief draws heavily upon a research report of analyses made by the Educational Testing Service, under Council sponsorship, of the available national data on admission to law schools in 1975-76. This Evans report[1] describes in detail the national effect of the present policies of the law schools which, like those attacked here, take minority status into account, and the opposite consequences on minority law school enrollments which would follow from affirmance of the decision below. This report is published and available to the parties and to the Court, and its contents will not be repeated at length here. An excerpt entitled Results of the Study appears as an appendix to this brief. A key finding follows:

> "7. If the nation's law schools were to adopt an admissions policy taking no account of minority backgrounds of blacks and Chicanos, a majority of the students from those groups now admitted and enrolled would be excluded. If blacks and Chicanos were accepted at the rates for non-minorities at the same levels of LSAT [Law School Admission Test score] and UGPA [undergraduate grade point average], the reduction in their enrollments would be 60% and 40%, respectively. If numerical predictors were employed exclusively for all applicants, the resulting reductions would be 76 to 78% for blacks and 45 to 48% for Chicanos. When law schools were asked to estimate the number of those minorities who would have been admitted if their minority status was unknown, they estimated reductions of 80% for blacks and 70% for Chicanos. The percentage of blacks among first-year law students would drop to between 1% and 2% from the current 5.3%, and the percentage of Chicanos would fall to between 0.4% and 0.8% from the current 1.36%."

[1] Evans, Franklin R., *Applications and Admissions to ABA Accredited Law Schools: An Analysis of National Data for the Class Entering in the Fall of 1976*, Vol. III, Reports of LSAC Sponsored Research, Law School Admission Council, Princeton, N. J. (1977) (hereafter cited as the Evans report).

The Law School Admission Council is an organization of the 163 nationally accredited law schools in the United States. Through the Council, the law schools have jointly arranged for a variety of centralized services, such as the Law School Admission Test, to assist the individual law schools in the admission process, and have carried on extensive research into all aspects of admissions.

While the Council does not undertake to tell member schools how to select among applicants, it does draw upon its statistical research and upon years of shared experience to provide recommendations and advice concerning the value and limitations of the test scores, college grade averages, and predictions based on their combination which are provided by Council services. Specifically, the Council has consistently warned against undue reliance upon such numerical predictors, to the exclusion of other factors not readily reduced to numbers or fed into a mathematical formula.

The tendency of numerical predictors to discourage or to exclude applicants with atypical backgrounds led the Council in 1963 to embark upon a program to facilitate access to law school, and to the legal profession, for

members of minority groups. In furtherance of this goal, the Council has sponsored a series of recruiting conferences and tours by law professors, lawyers, and students, offered the LSAT free at a number of predominantly black southern colleges and authorized fee waivers for other economically deprived applicants, served as a founding co-sponsor of the Council on Legal Education Opportunity, conducted a series of research studies into the possibility of bias in the numerical predictors and into their differential validity, and produced a variety of publications, including newsletters, surveys, reports, and a compilation about special programs titled *Graduate and Professional School Opportunities for Minority Students* (ETS, 6th ed. 1975). The nation's law schools have individually but overwhelmingly adopted policies aimed at the same goal of increasing minority enrollment.

The Council's concern in this case is predicated upon the potential effect of the decision below, to reduce minority enrollment in the nation's law school and to induce irrational reliance on numerical predictors. In the interests of brevity and simplicity, this brief takes black Americans as the working example of the minority groups affected. As the largest such group, widely dispersed in the nation, blacks typify many of the problems associated with minority admissions. Omission of reference to other minorities should not, however, be taken as indicating that their problems are not in many respects unique.

Because the Court will be fully aided by the parties and other *amici* in reviewing the authorities and analyzing the precedents, the Council will confine its presentation to certain data compiled and to the reasons underlying admissions policies of a large majority of American law schools.

SUMMARY OF ARGUMENT

For the past ten years, to cope with increasing volumes of applications for admission, a large majority of the nation's law schools, like the medical schools, have pursued an admissions policy with two complementary components: first, the use of college grades and admission test scores as measures of academic attainment, to predict probable academic performance in professional school, and second, consideration of an applicant's membership in a minority group subjected to unlawful discrimination and educational segregation.

The decision below, by requiring that all admissions decisions be color-blind, would if affirmed offer the professional schools a Hobson's choice between these two components of the integral policy. If measures of academic attainment were strictly applied without amelioration for minorities, law school enrollment from these groups would be forced down to 20% or 30% of present levels, to a token 1% or 2% of total enrollments, with resulting harm to the professional schools, the professions, and the public. On the other hand, if measures of educational attainment were excluded from admissions standards, and a lottery or equivalent device were used to allow for minority enrollment, the general failure rate for all students would rise to wasteful levels, unfair both to students admitted and excluded, the quality of education would suffer, and dangers of covert invidious discrimination would increase.

A simple, clear justification for prevailing policies, not considered by the court below, lies in the obvious causal explanation for minorities' lower achievements on measures of academic attainment. Today's minority

applicants are, in overwhelming proportion, products of a *de jure* segregated education system in their elementary and high school years. Eighty per cent of the blacks of this age group suffered such segregation, and the rate for other minorities is nearly as high. On these facts, the causative role of segregation is the only reasonable inference, when the only other explanation that could be offered would assume some inherent genetic inferiority wholly discredited by scientific opinion and contrary to the nation's first principle. This Court has itself attributed minorities' lower educational achievement to segregated education.

On this basis, a faculty may decide in fairness to make allowances from competitive requirements of educational achievement for minority applicants who have been denied, by unconstitutional segregation in earlier schooling, any reasonable opportunity to reach the levels of the best of the unhandicapped. Those admitted are fully qualified for law study, exceeding the average levels for all applicants of fifteen years ago, and are predicted to perform well above minimum law school standards.

Such a remedial policy, to redress a past denial of Equal Protection by other educational systems, does not itself violate that constitutional guarantee in reverse. Contrary to the ruling below, the courts hold no monopoly of power to implement the Constitution and its spirit, and legislation or administrative action by state educational officers, under delegated authority, is not prohibited until the state itself has violated the Constitution, or because the remedy would be beyond the power of a court. When a wrong is racial, a racial remedy is essential, and there is no need to seek non-racial alternative means, either for the state here or for Congress in Title VII and similar legislation. There is no need to

remedy all ills at once, and educational policy may properly determine whether to consider economic disadvantage as well as racial handicaps, and what portion of the available educational resources to devote to the remedial action. A limited allocation does not constitute an impermissible quota.

Even if professional schools were constitutionally barred from taking any remedial action, and were compelled to reinforce the prior wrong by ignoring the cause of minorities' lower academic achievement, still the determination of who is better qualified for the profession, as the ultimate standard, would verge on the arbitrary and capricious if made without consideration of the special background, experience, and motivation evidenced by minority status of an applicant in this era. A color-blind requirement would seriously impair the governmental and educational contribution of diversity, and the consideration of race or any other suspect category as one factor to be taken into account both positively and negatively in the interests of diversity of viewpoints and experience constitutes neither an unconstitutional preference nor a quota.

ARGUMENT

Introductory.

The Court in this case confronts the hard question faced ten years ago by the nation's law faculties. At that time it became clear that strict adherence to an admissions policy looking only to the selection of applicants who were better qualified, as measured by academic attainment, would operate upon a rapidly expanding pool of applicants virtually to exclude blacks and other minorities. This dilemma could not be escaped by simple resort to usual principles forbidding racial discrimination. When a relevant standard of selection would operate systematically to exclude a racial group, unequal treatment, in one direction or the other, is inevitable. Continued use of prior educational achievement as the admission standard, with full knowledge of the exclusionary consequence, would involve knowing if not purposeful exclusion of blacks. To abandon that standard, and to refuse to consider prior academic attainment despite its established validity as a predictor of law school success, would involve a knowing if not purposeful exclusion of applicants from the white majority who were in fact better qualified on this measure.

The apparent dilemma dissolves, however, if we consider its cause. Under principles of racial equality, the lower educational attainment of black and minority applicants can be explained only as the obvious consequence of the inferior education of these minorities in unlawfully segregated schools.

I.

A REASONABLE ADMISSIONS POLICY CAN PROPERLY TAKE ACCOUNT OF UNLAWFUL RACIAL SEGREGATION IN THE EARLIER EDUCATION OF MINORITY APPLICANTS.

An admissions policy need not be confined exclusively to the single-minded purpose of selecting those applicants who are best qualified, as the court below assumed. A reasonable faculty may also choose to consider the fairness of its standard, as applied to applicants who have been unconstitutionally deprived in earlier education of an equal opportunity for academic achievement. It may be assumed for purposes of argument here, and reserved for later refutation, that prediction is accurate and correctly aimed. Conceding, then, that others may be better qualified for future professional contribution, a rational policy need not be wholly prospective in its focus, but may look to the past as well, making allowance for diminished attainment and its cause, whether the applicant be blind or black.

The resulting overall policy, adding this element of fairness to a general standard of academic attainment, has been widely adopted among the law schools as well as the medical schools and throughout higher education. As a voluntary remedy for past segregation, its use should not be forbidden, as by the decision below, because a court did not order its adoption, or because such a remedy would be beyond judicial power, or because a different policy would not violate the Constitution. The policy, being remedial for past wrongs, involves no need to identify some future social goal to be achieved as the state interest, whether compelling, important, or substantial, and no need of strict scrutiny for other, less intrusive means to achieve it. The classification, based on racial wrong unconstitutionally committed in the past, is not suspect since the foundation is

not race itself but the handicap inflicted upon a group selected by race. As a policy voluntarily adopted to govern admission to higher education, giving minorities a chance to prove their abilities in law school, the policy involves no duty imposed on resisting persons and no deprivation of vested occupational rights, but rather a reasonable allocation of a scarce resource of the state.

This clear and straightforward justification for taking race into account was ignored in the opinion below, commanding strict adherence to a single-purpose standard selecting only those who are better qualified without regard to race. The ruling if affirmed would displace the collective judgment of the nation's educators, who have acted in the reasonable belief that the Constitution does not forbid remedial action to implement its guarantees and their spirit.

A. The Educational Achievement of Current Applicants Has Been Suppressed by Inferior Education in Segregated Schools.

The admission of minority applicants to graduate and professional schools in the 1970's must be seen in perspective as the culmination of an educational process that began in the elementary schools in the 1950's. In the intervening years their progress through that process was marked by increasing minority attrition at each successive stage. The gradual shrinkage of minority participation in the educational progression can be demonstrated by following the black population up the educational ladder, in comparison with the white majority.

(1). Few Minorities Attained College Degrees.

For 1976, the most recent entering class, the typical applicant for professional or graduate study was between 21 and 26 years of age. Of that age group, whites constituted 81%, and blacks 12.7%.[2] A member of that group who had proceeded regularly through school without interruption, to begin post-baccalaureate study in 1976, was born in 1954, the year this Court decided *Brown v. Board of Education*, 347 U.S. 483 (1954), and had received his high school diploma in 1972. In that year, only 68% of blacks finished high school, compared with 85% of whites.[3] In the following fall, it has been estimated that 47% of white high school graduates entered college as freshmen, compared with only 38% of the blacks.[4] In the sophomore and junior college years the attrition continued, with from 19% to 20% of blacks of the appropriate age enrolled in college in 1973 and 1974, compared with 32% to 33% of the whites.[5] Approximately 29% of the whites in this age cohort were graduated from college, compared with 11% of the blacks, according to the data for 1974, the most recent year for which studies are available.[6] Nearly half of the blacks (45%) received their baccalaureate degrees from predominantly black institutions, mostly in the South, and only 20% of the blacks, compared with 36% of the whites, were awarded their degrees by universities, public or private, as contrasted with colleges having no graduate or professional departments.[7]

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[2] *Minority Group Participation in Graduate Education*, National Board on Graduate Education, Washington, D.C., p. 38 (1976).

[3] Ibid., p. 97.

[4] Ibid., p. 65.

[5] Ibid., p. 67.

[6] Ibid., p. 69.

[7] Atelsek and Gomberg, *Bachelor's Degrees Awarded to Minority Students, 1973-74*, American Council on Education, Higher Education Panel Report No. 24, p. v (1977).

This gradual downward progression in the educational opportunity of the blacks is presented in tabular form below:

Comparison of Percentages of Black and White Students at Successive Educational Levels, 1954-1974

Educational Level	White Students as Percent of All Whites in Age Group	Black Students as Percent of All Blacks in Age Group	Number of Blacks per 100 Whites in Group
Born 1954 and entered first grade 1960:	100% (81% of total population in age group)	100% (12.7% of total population in age group)	15.6
Graduated from high school 1972:	85%	68%	12.5
Entered college as freshmen Fall 1972:	39.7%	26.0%	10.2
Enrolled in college 1973-74:	32.5%	20.5%	9.1
Graduated from college 1974	29.3%	10.7%	5.7

From this tabulation, it is evident that in the twenty-year period relevant to this case the forces of cumulative educational attrition operated to reduce by nearly two-thirds the number of blacks, in comparison with whites, who finished college and were thus eligible to apply for admission to graduate or professional study. Against these headwinds, a black who has merely succeeded in earning a college degree has out-distanced ninety percent of his fellow black students, while the white college graduate, by that accomplishment, ranks himself only in the top third.

(2). Educational Segregation Was Overwhelmingly Prevalent.

The legal milestones on the educational path of these students point to the obvious cause which excluded two-thirds of the blacks, in comparison with whites, by the time of college graduation. The typical college graduate of 1976 was 22 years old, born in the year when this Court first held racial segregation in public schools to be unconstitutional. *Brown v. Board of Education*, 347 U.S. 483 (1954). This typical student had reached the fourth grade in elementary school before enforcement authority was conferred upon the Department of Health, Education, and Welfare with the Civil Rights Act of 1964, and he was entering the formative high school years when enforcement began in earnest with this Court's declaration that "delays are no longer tolerable" and that the obligation of every school district was to terminate dual school systems at once. *Green v. County School Board*, 391 U.S. 430, 438-39 (1968). According to the 1970 census, roughly half the black population of the United States (11,640,000 of 21,970,000) was living in the South,[8] where racial segregation in education was required by explicit state statutes. The other half of the black population was concentrated heavily in the metropolitan and industrial centers of the North and Far West, in the central cities where racial segregation had been accomplished, also *de jure*, through official establishment of discriminatory school district boundaries and attendance zones. In light of this experience, it is apparent that most black students graduating from high school in 1972 (who might later apply in 1976 for post-baccalaureate work) were victims of segregated schooling, limiting their educational attainments.

[8] General Social and Economic Characteristics: United States Summary PC (1)-C1. U.S. Dept. of Commerce, Bureau of the Census (June, 1972).

This conclusion is confirmed by the records of the Department of Health, Education, and Welfare, surveying the various school districts of the nation and specifying those districts which, from 1968 to 1973, had been adjudged, either in the courts or in administrative proceedings, to be racially segregated in violation of the Constitution and federal law.[9] Tabulating this list of unlawfully segregated districts against the HEW records of the number of minority students enrolled in 1972 in those school districts and in non-violating districts,[10] it is a simple matter to calculate the percentage of minority students attending segregated schools which had been officially adjudicated to be unlawful. Although the surveyed school districts cover only 97% of the total projected black student enrollment in public schools in the United States,[11] and do not list as violators several large districts currently under investigation, the figures provide at least a minimum measure of the sweeping impact of segregation upon minority students who finished public schooling in 1972.

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[9] The survey list has been supplemented from HEW records to add districts which were later adjudged to be unlawfully segregated, after completion of the survey in 1973.

[10] Directory of Public Elementary and Secondary Schools in Selected Districts: Enrollment and Staff by Racial/Ethnic Group, Fall 1972, U.S. Dept. of Health, Education and Welfare, Office of Civil Rights, OCR 74-5.

[11] The total projected enrollment of black students in public schools in the United States in 1972 was 6,796,210; the number enrolled in the districts surveyed by HEW was 6,607,015. The survey omitted districts with total enrollments under 3,000 unless they had been found independently to be in violation of law.

Among the black population, 75.4% of the students (4,984,380 of 6,607,015) attended public school in unlawfully segregated districts, adjudicated to be in violation of this Court's commands in *Brown*. For all minorities, including American Indians, Orientals, and Spanish Americans, the percentage of students who had been found to be victims of illegal segregation is 62.6% (5,826,169 of 9,303,397). Litigation is currently in process in a number of other districts. If their enrollments are added, the percentage of blacks in segregated schools rises to 83.4% (a total of 5,512,938), and the percentage for all minorities increases to 72.1%.[12] A tabulation by states is presented on the following pages.

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[12] Thirteen school districts are involved in pending litigation, and the New York City school system received HEW notifications of non-compliance on Nov. 9, 1976, and Jan. 8, 1977; a compliance plan submitted by the City has been rejected by HEW. Also included in these augmented figures are two districts where the adjudication was based on segregation of faculty: San Diego (16,492 blacks and 32,762 total minorities) and Rochester, N.Y. (16,490 blacks and 19,076 total minorities). The State of Hawaii is not covered, nor are those districts which have been adjudged in violation for failure to provide bi-lingual education.

Minority Student Enrollment in School Districts Adjudicated to be Unlawfully Segregated, by State

1972

Source: United States Department of Health, Education and Welfare.

STATE	TOTAL ADJUDICATED TO BE UNLAWFULLY SEGREGATED					TOTAL IN COMPLIANCE SURVEY		
	Number of School Districts	Black Students Enrolled	Per Cent of Black Students in State	Total All Minority Students Enrolled	Per Cent of All Minority Students in State	Number of School Districts	Black Students Enrolled in State	Total All Minority Students Enrolled in State
Alabama	105	244,241	99.5	245,165	99.5	106	245,391	246,318
Alaska	–	–	–	–	–	10	2,396	16,900
Arizona	2	319	3.1	3,384	3.0	91	15,437	111,781
Arkansas	67	77,861	96.5	78,311	95.7	140	80,642	81,854
California	9	210,827	49.5	438,931	34.9	500	425,857	1,257,343
Colorado	2	15,761	71.7	40,550	47.7	71	21,980	96,868
Connecticut	1	143	0.2	163	0.2	132	60,471	84,973
Delaware	4	15,921	58.5	16,626	58.1	22	27,194	28,626
Dist. of Columbia	1	133,638	100.0	135,072	100.0	1	133,638	135,072
Florida	60	341,174	99.6	424,497	99.3	62	342,614	427,406
Georgia	148	341,635	98.1	344,323	98.0	159	348,231	351,383
Idaho	–	–	–	–	–	49	444	7,376
Illinois	7	341,314	81.2	408,801	79.8	494	419,037	514,701
Indiana	6	87,237	76.9	92,935	70.9	225	113,454	131,155
Iowa	–	–	–	–	–	209	10,667	14,918
Kansas	–	–	–	–	–	146	31,906	44,019
Kentucky	30	20,556	34.8	20,746	34.8	142	59,124	59,913
Louisiana	65	343,755	100.0	348,930	100.0	65	343,755	348,930
Maine	–	–	–	–	–	71	375	1,173
Maryland	13	207,453	89.4	210,669	87.2	24	232,033	241,640
Massachusetts	2	39,182	69.3	48,700	62.1	229	56,533	78,368
Michigan	5	208,858	69.1	217,011	63.7	384	302,069	340,567
Minnesota	1	6,510	58.9	9,743	38.2	229	11,051	25,505
Mississippi	126	241,915	100.0	242,741	100.0	126	241,915	242,741
Missouri	9	40,815	28.2	40,693	27.1	227	144,698	150,733
Montana	–	–	–	–	–	48	313	5,221

STATE	TOTAL ADJUDICATED TO BE UNLAWFULLY SEGREGATED					TOTAL IN COMPLIANCE SURVEY		
	Number of School Districts	Black Students Enrolled	Per Cent of Black Students in State	Total All Minority Students Enrolled	Per Cent of All Minority Students in State	Number of School Districts	Black Students Enrolled in State	Total All Minority Students Enrolled in State
Nebraska	1	12,220	90.6	13,741	74.5	72	13,483	18,431
Nevada	1	10,082	91.5	13,648	72.8	11	11,030	18,911
New Hampshire	–	–	–	–	–	90	973	1,982
New Jersey	13	126,733	56.9	177,726	59.0	336	222,629	301,323
New Mexico	–	–	–	–	–	46	6,150	129,099
New York	3	29,377	5.3	32,448	3.5	500	552,204	914,538
North Carolina	122	338,589	96.1	349,872	97.6	146	342,152	358,491
North Dakota	–	–	–	–	–	47	513	3,139
Ohio	10	176,501	60.5	191,684	61.1	476	290,557	313,622
Oklahoma	25	36,916	77.3	47,374	60.5	148	47,748	78,393
Oregon	–	–	–	–	–	199	8,396	19,802
Pennsylvania	22	233,661	97.6	244,358	84.7	428	267,052	288,443
Rhode Island	–	–	–	–	–	29	7,671	9,519
South Carolina	60	252,293	100.0	253,901	100.0	60	252,293	253,901
South Dakota	–	–	–	–	–	61	425	7,067
Tennessee	76	180,939	96.3	182,741	96.5	123	197,906	199,426
Texas	302	393,642	94.4	617,211	66.1	448	385,396	933,086
Utah	–	–	–	–	–	33	1,581	18,786
Vermont	–	–	–	–	–	21	96	199
Virginia	77	240,411	96.6	249,231	96.2	114	251,560	259,064
Washington	1	10,837	52.4	17,215	30.6	144	29,683	56,333
West Virginia	5	5,221	28.9	5,373	28.1	60	18,139	19,103
Wisconsin	3	42,186	93.0	60,276	81.8	249	45,379	61,473
Wyoming	–	–	–	–	–	35	778	5,133
TOTAL ADJUDICATED		4,984,380	75.4	5,835,168	62.6		6,607,015	9,303,397
PENDING PROCEEDINGS		528,558		877,003				
TOTAL ADJUDICATED AND PENDING		5,512,938	83.4	6,703,171	72.1		6,607,015	9,303,397

These figures provide a ready answer to the question of why the pool of potential minority applicants to graduate and professional schools is severely limited, and explain why when blacks in their early twenties constitute 12.7% of the total population, they constitute only 5.3% of students graduating from college.[13] More than three of every four have been unlawfully shunted into racially segregated public schools, where they have received an inferior education in second-class facilities, in surroundings where expectations are low and aspirations are discouraged.

(3). Minority Applicants Achieved Lower Academic Attainment.

It would be astonishing if these survivors of unequal education in segregated schools were able to present, in their applications to graduate or professional schools, evidence of academic attainment equal to the records of the white majority. Of course they do not. Recent studies have analyzed the pool of 1976 applicants for professional study in the nation's medical schools (the Gordon report[14]), and in the law schools (the Evans report[15]), comparing minority applicants with the ma-

[13] See *Minority Group Participation in Graduate Education*, National Board on Graduate Education, p. 38 (1976), for census tabulations, and Atelsek and Gomberg, *Bachelor's Degrees Awarded to Minority Students, 1973-74*, American Council on Education, Higher Education Panel Report No. 24, p. 4 (1977). The comparable figures for Chicanos, from the same sources, are 2.75% and 1.3%.

[14] Gordon, Travis L., *Descriptive Study of Medical School Applicants, 1975-76*, Association of American Medical Colleges, Washington, D.C. (1977).

[15] Evans, Franklin R., *Applications and Admissions to ABA Accredited Law Schools: An Analysis of National Data for the Class Entering in the Fall of 1976*, Vol. III, Reports of LSAC Sponsored Research, Law School Admission Council, Princeton, N.J. (1977).

jority. Their findings are consistent and expected: applicants from minority groups subjected to unlawful educational segregation rank significantly lower than white applicants on the conventional measures of academic achievement.

To assess the educational attainments of their applicants, both medical and law schools use the records of grades earned in undergraduate courses in college, and the scores achieved on standardized objective tests administered nationally by organizations of the respective schools and called the Medical College Admission Test (MCAT) and the Law School Admission Test (LSAT). Grades earned in college inevitably reflect the student's preparation in high school and in the preceding years, while the objective tests measure certain abilities developed or acquired in the educational process with emphasis on verbal skills such as reading comprehension, vocabulary, grammar and syntax, and on quantitative and mathematical abilities.

Standardized test scores, like college grades, are "biased" against blacks not in the sense that they predict that such students will earn lower law school grades than they actually receive, nor that such numerical indicators predict less accurately for one race. It would be contrary to basic premises of equality to suppose that a paper and pencil test of educational attainment could determine skin color among students who have been equally educated. Like college grades, test scores penalize blacks not because the tests measure innate intelligence or mental capacity, but rather because they measure abilities which are taught, acquired, and developed in formal education. A different, inferior education naturally tends to produce different, inferior scores.

For law school applicants, the comparative analysis of these measures in the Evans report[16] reveals the impact of inferior schooling for minorities. While 40% of white applicants presented a cumulative undergraduate grade point average (UGPA) above 3.25 (B plus), only 13% of the blacks had college grade averages above that level. Dropping down to the level of 2.75 (B minus), 75% of white applicants fell above the line, in contrast with only 45% of the blacks. On LSAT scores, the differentials are even greater. Some 37% of white applicants scored above the 600 level (approximately the 75th percentile for all test-takers, including those who do not complete their applications), as compared with 3% of black applicants. At the 500 level of LSAT scores (roughly the national average), 77% of white applicants, as compared with 19% of the blacks, received scores above that line. When college grades and test scores are weighed together, in accordance with prevailing law school practice, these disparities reinforce each other. Only 1% of blacks, as against 20% of whites, have both college grade averages above 3.25 and LSAT scores above 600, and 11% of blacks, versus 61% of whites, have both college grade averages above 2.75 and LSAT scores above 500. It is inescapably apparent from these comparisons that unequal educational opportunity has taken its toll. The following tabulation is excerpted from the Evans report, Table 16, p. 36.

[16] Evans report, p. 36, Table 16.

Number and Per Cent of Applicants at or above Selected Levels of LSAT Scores and College Grade Averages

Level	Black		White (and Unidentified)	
	Number in National Pool	Per Cent of Blacks	Number in National Pool	Per Cent of Whites
LSAT at or above 600	142	3	24,468	37
LSAT at or above 500	811	19	51,307	77
LSAT at or above 450	1,437	33	59,359	89
College grades at or above 3.25	556	13	26,753	40
College grades at or above 2.75	1,929	45	50,316	75
College grades at or above 2.50	2,805	65	58,420	87
Combined: LSAT at or above 600 and college grades at or above 3.25	39	1	13,151	20
Combined: LSAT at or above 500 and college grades at or above 2.75	461	11	40,906	61
Combined: LSAT at or above 450 and college grades at or above 2.50	1,040	24	52,868	79

The Evans report also shows the cumulative effect of the segregated educational system which produced only one-third as many black college graduates, proportionally to population, as whites, and which left these survivors with lower educational attainment, as measured by college grades and test scores. As ranked by these measures, the top 41,500 law school applicants for 1976 (5% more than total first-year enrollment) included between 369 and 411 blacks, depending upon the relative weights given to UGPA and LSAT.[17] Thus 13% of the population at the age level for law school entry is decimated to roughly 1% who, against these educational headwinds, have managed to match the educational attainments of the white majority.

B. An Admissions Policy Making Allowance for Effects of Prior Segregation Is Reasonable.

In the current era of transition toward full equality of educational opportunity, the lawyers who comprise the nation's law faculties, and their admission committees, confront a situation where minority applicants are the products of an educational system still largely segregated when they passed through, which has allowed only one-third as many blacks as whites, in proportion to their populations, to complete college, and has left these survivors severely handicapped in their relative academic attainment as measured by the conventional yardsticks of grades and test scores. Faced by these hard realities, law schools have been compelled to choose between two contrasting policies of admission: a color-blind policy (as mandated by the court below) or a policy which takes account of the education disadvantages unlawfully imposed upon their minority applicants (as overwhelmingly adopted in higher education).

[17] Evans report, pp. 49, 50, Tables 21 and 22.

(1). Upon Premises of Racial Equality, the Minorities' Educational Disadvantages Are the Result of Segregation.

A color-blind policy would be ideal in a nation with no history of racial discrimination, or where all vestiges of such discrimination had been eradicated. In this nation and in this generation, however, to base admission upon "merit" as measured by past educational attainment, with no consideration of race, could be justified only upon premises which conflict with basic constitutional tenets and would entail consequences which, paradoxically, violate the ultimate goals of the color-blind ideal.

In using academic attainment as the admission standard, without amelioration for past educational discrimination, the law school would aid and abet the constitutional violation committed by other institutions through which the applicant had passed in his progress up the educational ladder. Whether or not a school could lawfully accept only applicants who had attended schools from which blacks were excluded, a law faculty may surely prefer not to reinforce past wrongs, and may choose not to inflict further harm upon minority applicants solely because of the handicaps they labor under as victims of previous educational segregation. The runner who was illegally shackled in running the elimination heats cannot, in fairness, be excluded from the race.

Moreover, to use educational attainment as the measure of ability, while refusing to come to grips with the glaring question of *why* minority applicants rank lower on these measures, or to consider past discrimination as the obvious cause, would involve a tacit but implicit adoption of a premise of genetic inferiority,[18] in

[18] Jensen, *Selection of Minority Students in Higher Education*, 1970 Toledo L. Rev. 403 (1970).

direct conflict with the first and essential premise of democratic government. Law school faculties, unlike the court below, have chosen to face that question, to look to the cause of minority applicants' lower college grades and test scores, and to base their admission policies upon a working premise that is consistent with racial equality. They should not be compelled to follow an approach which denies, *sub silentio*, that unlawful segregation has produced any effect, and which therefore could be explained only on some undemocratic and unscientific assumption that biologically or genetically, members of minority groups are incapable of equal education attainment.

(2). Segregation Is Judicially Regarded as Impairing Educational Achievement.

In adopting racial equality as the working premise for admissions, and in taking earlier segregated education as the cause of minorities' diminished educational achievement, a law faculty goes no further than the teachings of this Court. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), sustained remedial action to ameliorate the exclusionary effect of using measures of educational attainment (standardized test scores and high school graduation) which "operate to disqualify Negroes at a substantially higher rate than white applicants." 401 U.S., 426. The cause for this disqualification was directly ascribed:

> "This consequence would appear to be directly traceable to race. Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are Negroes, petitioners have long received inferior education in segregated schools . . . ." 401 U.S., 430.

The question of what causes the lower educational achievement of minorities who received their early schooling in an era of racial segregation was also before this Court, in a different context, in *Oregon v. Mitchell*, 400 U.S. 112 (1970), involving congressional action against the exclusionary impact of literacy tests for voting. The remedy was justified by the cause, identified by reason and experience:

> "Congress also had before it this country's history of discriminatory educational opportunities in both the North and the South. The children who were denied an equivalent education by the 'separate but equal' rule of *Plessy v. Ferguson*, 163 U.S. 537 (1896), overruled in *Brown v. Board of Education*, 347 U.S. 483 (1954), are now old enough to vote. There is substantial, if not overwhelming, evidence from which Congress could have concluded that it is a denial of equal protection to condition the political participation of children educated in a dual school system upon their educational achievement." 400 U.S., 133.

Earlier, in *Gaston County v. United States*, 395 U.S. 285 (1969), the Court had drawn the same causal inference:

> "It is only reasonable to infer that among black children compelled to endure a segregated and inferior education, fewer will achieve any given degree of literacy than will their better-educated white contemporaries. . . . 'Impartial' administration of the literacy test today would serve only to perpetuate these inequities in a different form." 395 U.S., 295-97.

Accordingly, the nation's law schools, like the medical schools,[19] have broadly agreed in concluding that race

[19] The history of medical schools' policies is recounted in Odegaard, Minorities in Medicine: From Receptive Passivity to Positive Acceptance, 1966-76. Josiah Macy Foundation, New York (1977).

must be taken into account as a factor in admissions. The triggering factor is not race in any genetic or biological sense, but rather those classifications, however defined, that have been employed unconstitutionally in the past to separate the population and to group people for discriminatory treatment. It is ironic but true that the cure must match the disease, and that to identify the victims of discrimination, we must adopt the same forbidden categories which were used by the wrongdoers to isolate their victims. When race has been used to segregate children for inferior education, there is no escape from the use of race in making compensatory or remedial allowance for the handicap thus inflicted.

(3). A Policy Remedying the Handicaps of Segregation Is Supported by Reason and Fact.

To take account of minority status under these circumstances does not rest upon any notion of reparations to a whole people, nor upon the ignoble history of slavery involving ancestors four generations removed from today's applicants. The handicaps taken into consideration result from the unconstitutionally segregated education perpetrated upon *this* generation of applicants. It is unmistakable, of course, that education is but one aspect of a general cultural suppression involving jobs, housing, and participation in the governmental processes as well as education. Discriminatory forces press in upon the individual minority member from various directions, and reinforce their separate impact. Educational attainment is inhibited not only by segregation in the classroom, but also by the ceiling on aspiration imposed by limited career opportunities and diminished expectations of the teacher. Their effects are inextricably interrelated, and the black

student who escapes from one discriminatory force—be it poverty, the ghetto, or the segregated school—remains subject to the impact of the other forces operating to restrict his academic achievement. He remains identified as a member of a group doomed to menial work, for whom academic accomplishment has no apparent value, and for whom the learned professions are traditionally closed.

In a mobile society, with people moving frequently from place to place and from school district to school district, it approaches inevitability that a black applicant will have received a significant part of his schooling, like 80% of his fellow black students, in an unlawfully segregated school. The inference of past segregation is compelled by overwhelming evidence. The rare applicant who, against all odds, has evaded segregated schooling, and has overcome the inhibitory effects of knowledge that his race generally has been stamped as inferior by state and school authorities, will need no remedial evaluation of his application, for the probabilities are high that he will pass muster anyway. Admissions is inherently a process based upon inferences and presumptions founded in experience. A workable policy, avoiding the imposition of exorbitant costs upon the schools and their students, must apply generally like the law. The possibility that some black voters' failure to pass the literacy test might not have been caused by segregated education does not invalidate the congressional remedy for the widespread wrong. In this case the Davis medical school operated upon the premise that minority students were disadvantaged for that reason and by that status, unless that inference, reasonable if not compelled, was rebutted by available evidence. Unless unconstitutional wrongs are to be perpetuated, such an approach is essential.

A policy of this kind involves no discrimination, benign or benevolent in the sense of a benefit for those who are thought to be more worthy. It assumes neither the superiority of one group, nor inferiority of another which would leave its members in need of charity and aid. It is not preferential in the sense of boosting those who could not succeed in fair and open competition. On the contrary, the animating premise is equality, not preference, and the fundamental commitment is the belief which underlies the Constitution: that all ethnic groups are equally capable of educational achievement, that in a society free of discrimination no major differences would exist between such groups, and that the diminished academic attainment of minority applicants must be attributed to past discrimination against them. The principle is racially neutral, and would apply equally if today's minorities should attain controlling power and should inflict educational handicaps upon the whites. Such a premise of equality as the foundation of action is the opposite of the discriminatory purpose which this Court has ruled to be an essential element of a denial of Equal Protection. *Washington v. Davis*, 426 U.S. 229 (1976).

On this foundation, an admissions policy taking race into account contains its own time limitations. The policy will expire of its own force when the applicants coming to the graduate and professional schools are no longer the products of segregated elementary and high schools, and the promise of *Brown* has been fulfilled. In the meantime, to forbid such a policy would condemn still another generation to the serfdom created by past wrongs. There is also the real possibility that the need for this remedial policy will disappear even before equal

education has become a reality, if the current general trends in college attendance and law school applicant volumes should continue and accelerate. Minority admissions became a problem only with recent increases in applications, in numbers far beyond the capacity of the schools to accommodate. A decline to earlier levels would solve the problem, allowing all qualified applicants to enroll, and dispensing with the need for any consideration of minority status.

(4). The Remedial Policies Adopted Are Reasonably Limited in Scope and Effect.

Although remedial policies for minority applicants have been widely adopted by the nation's law schools, their actual effect has been modest—too modest, some think. In the Prelaw Handbook, more than 90% of ABA approved law schools have announced that the school "actively recruits minority and disadvantaged students."[20] These recruiting activities have met with success. Black college graduates apply more frequently than whites, by a margin of 8.3% of blacks to 7.3% for whites.[21] Indeed, this recruitment success has caused the other graduate disciplines to complain that law and medicine are skimming the cream from the pool of most promising minority students.[22] Contrary to the specula-

[20] Prelaw Handbook: Annual Official Guide to ABA-Approved Law Schools, 1976-77, pp. 36-43, AALS and LSAC, Princeton, N.J. (1976).

[21] The Evans report, p. 29, indicates that 4,299 blacks and 66,994 whites applied to law school in 1975-76. Numbers of baccalaureate recipients, to compute application percentages, were taken from *Minority Group Participation in Graduate Education*, p. 69, National Board on Graduate Education (1976).

[22] "Concomitant with the general upsurge in student interest are special efforts by these schools to recruit minorities into law and medicine. While acknowledging the real need for more minority doctors and lawyers, graduate schools of arts and sciences often point to the loss of promising graduate students to these professional fields of study." *Minority Group Participation in Graduate Education*, p. 60, National Board on Graduate Education, Washington, D.C. (1976).

tions of the majority opinion below, there is little reason to believe that further recruitment efforts would improve or enlarge the minority pool, especially if, as the opinion would require, such efforts were directed indifferently to all races.

Despite effective recruitment, the pool of available talent is limited. Nearly all law schools today require a bachelor's degree as a condition of eligibility for consideration, and proportionately few minorities cross that threshold. College grades and standardized test scores are useful—although far from precise—indicators of probable law school grades, since past academic attainment tends to predict future academic attainment. Because minorities generally rank lower on these measures, for reasons evident from their previous educational experience, a somewhat disproportionate number of minority applicants must be rejected as having no reasonable chance of completing law school, so that to admit them would be a misallocation of resources, wasting a year of their lives and occupying valuable law school seats. Accordingly, only 39% of black applicants to the nation's law schools were admitted to the class entering in 1976, in contrast with 59% of the white applicants.[23] The comparison should dispel any notion that blacks might not be carefully screened, or that they are welcomed without regard to probable academic success. Those who are admitted are fully qualified, and are predicted by the numerical indicators of probability to have an excellent likelihood of law school graduation. By these numerical predictors, they would have been accepted as a matter of course but for the fact that the increase in applicant volume has far outdistanced the increase in law school places in the past fifteen years.

[23] Evans report, p. 37.

Their average scores on the LSAT are as high as or higher than the median scores of students registered at 80% of the nation's law schools in 1962, who have since graduated and risen to prominence in the bench and bar.[24]

By taking minority status into account in accordance with these policies, the 163 ABA approved law schools in the aggregate enrolled a grand total of only 2,128 blacks in the 1976 entering class. They occupy only 5.3% of the available seats, and constitute a minute fraction of the total 76,061 applicants. To exclude them all would have no significant effect toward reducing the net disappointment felt by 30,000 unaccepted applicants, and at those volumes, none can be certain that the admission of a black was the cause of his personal disappointment. As in *Washington v. Davis*, 426 U.S. 229 (1976), the blacks accepted fall short of parity with their proportion of the total applicant pool, and unlike the situation in that case, fall far short of parity with their proportion of the relevant age group in the population from which the applicants are drawn.[25] Law school applicants are drawn from throughout the country, and every law school receives a majority of its applications from nonresidents of its state.[26] Nationally, blacks constitute 13% of the total population in the age range usual for beginning law study, but only 5.3% of actual beginners. By chance, this percentage happens to correspond directly with the percentage represented by blacks among the nation's baccalaureate recipients, the maximum eligible

[24] Evans report, pp. 39, 4.

[25] *In Washington v. Davis*, 426 U.S. 229 (1976), the number of minorities accepted for police training was proportional, as the Court noted, to the percentage of blacks age 25 to 29 living within a 50 mile radius of Washington, D.C.

[26] Evans report, p. 2.

population for law school.[27] Of course the goal is not proportional representation, to make every law school class a perfect microcosm of the national population. The goal is rather to provide equal educational opportunity within reasonable limits for those few survivors of segregated education who have demonstrated full qualification for successful completion of the course of law studies.

When minority recruitment policies were first adopted, around 1968, minority law school enrollments rose rapidly for a few years, but have now leveled off to a rate of increase comparable to the rate for total law school enrollments.[28] In an era of constant flux, the policies adopted by law schools for consideration of minority status are by no means uniform, and are necessarily evolving and somewhat tentative. As in a line of judicial decisions, the policy is shaped and developed through experience. The answers do not all reveal themselves at once, and a degree of experimentation is both inevitable and wise. A particular policy, no matter how well reasoned its design, needs testing in the trial of actual use. The possibility of bias in the usual quantified predictors of law school grades, or in the law school grading process itself, can be investigated empirically only if an adequate number from a minority group is enrolled and actually graded.

Although the minority admissions policies have varied widely among the law schools adopting them, they are united on one essential: minority status must be taken

[27] Atelsek and Gomberg, *Bachelor's Degrees Awarded to Minority Students, 1973-74*, American Council of Education, Higher Education Panel Report No. 24, p. 6 (1977).

[28] Total first-year enrollment in ABA approved law schools rose 2.5% in 1976 over the previous year, from 39,038 to 39,996. Black first-year enrollment rose 4%, from 2,045 to 2,128. ABA Enrollment Report for Fall, 1976, (1977).

into account both to serve rationally the basic purpose of selection, and to avoid perpetuating the harms of educational segregation.

C. The Opinion Below Erroneously Invalidates This Reasonable Remedial Policy.

(1). The Court Below Ignored the Distinction Between Constitutional Commands and Permissible Policies.

The basic fallacy of the majority opinion in the court below is found in its unstated but major premise, that any remedial action which is not *compelled* by the Constitution is therefore *forbidden* by it. This remarkable rationale is revealed by the opinion's treatment of *Washington v. Davis*, 426 U.S. 229 (1976). In accordance with this Court's holding on the constitutional aspect of that case, the California court observed that "absent a racially discriminatory purpose, a test is not invalid solely because it may have a racially disproportionate impact." 18 Cal. 3d, 59. But the opinion wholly overlooks the implications of the non-constitutional portion of this Court's decision. Although the opinion below notes that this Court "has made it clear that the standard for adjudicating claims of racial discrimination on constitutional grounds is not the same as the standard applicable to cases decided under Title VII," 18 Cal. 3d, 59, the significance of this difference remains unrecognized. The distinction so drawn means, of course, that the legislature may act to remedy discriminatory actions which do not violate the Constitution. Unless he is involved with government, a private employer is subject to no direct commands from the 14th or 5th Amendments in his hiring practices. Congress may act to eradicate discrimination in this field, however, despite the fact that the Constitution does not compel

such remedial action, and Congress may equally choose to define the wrong of racial discrimination by use of different standards than those laid down by the Constitution. For the same reasons, Congress may provide for remedies which would not be within the constitutional power of a court acting under the authority of the Constitution alone. Ignoring the wide-ranging federal legislation resting on these principles, the California court assumes that it is unconstitutional to afford any remedy to minorities for discrimination against them, unless the remedy is ordered against a judicially-convicted violator and is within the traditional power of a court to decree.

This assumption that the courts hold an exclusive monopoly over all remedies for discrimination, and that all other organs of government, state and federal, are powerless to expand or extend the minimums guaranteed by the Constitution, would invalidate in its sweep a host of congressional enactments and, with them, a multitude of parallel provisions in state statutes and constitutions. And the courts would never be large enough. Even for the relatively narrow educational field at issue here, the supreme courts would be converted into supreme admission committees. Perhaps some faculty members would be pleased to deliver up their thousands of application files to a court for decision between the contending claimants, as upon a bill of interpleader. But the basic values at stake are educational, and the responsibility rests with the educators to exercise their entrusted discretion reasonably and fairly. That responsibility has been taken seriously by the lawyers who constitute the nation's law faculties and their admission committees. A measure of the deliberate and conscientious consideration given to these complex issues by legal educators is

afforded by the sheer volume of articles published in the nation's law reviews, and by the number of detailed research studies in the field. This extended analysis and debate has produced a broad consensus among experts in legal education, reflecting a collective judgment worthy of deference.

The state of California, through its chosen legislative processes, was empowered like Congress to take remedial action against discrimination and its vestiges, and to delegate powers to administrative organs of government, whether an EEOC or the board of regents of the University or its several faculties. While the federal remedy does not extend its prohibitions to the use of a test measuring educational attainment, even with full knowledge that the measuring rod has a racially differential impact, so long as the scores correlate reasonably with success in the training program for which it is selecting, according to this Court's interpretation in *Washington v. Davis*, 426 U.S. 229 (1976), the state may reasonably choose to extend the remedy another step, and to ameliorate the exclusionary effect where neither the test nor the training grades it predicts have been shown to be fully accurate predictors of actual performance in the profession. *Cf. Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

These principles are the foundation of this Court's recognition of the state's power to take voluntary action on its own, without court order or an adjudicated violation of the Constitution, to eliminate educational segregation:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a

> prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of constitutional violation, however, that would not be within the authority of a federal court." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971).

This Court's concluding sentence as quoted above is enough to expose the fallacy in the conclusion of the court below that "obviously", a remedy cannot be "voluntarily initiated" if it could not be "compelled by a court." 18 Cal. 3d, 59. Of course judicial relief is predicated upon liability, and a court cannot compel a resisting defendant to take remedial action without a prior finding of a wrong. But it simply does not follow from that truism that a person is forbidden to comply with the law or its spirit until he has first been found guilty of a violation, as ruled by the majority below.

(2). Limitations on Judicial Remedies Do Not Apply to Voluntary Action.

In reasoning to its conclusion, the court below failed to recognize another critical distinction: between the constitutional guarantee of Equal Protection on the one hand and on the other, the general equitable principle that in fashioning relief to provide redress for a civil wrong committed against one innocent party, a court should cause no unnecessary detriment to other innocent parties. The reason for the judicial caution evident in some cases involving a choice of remedies for racial wrongs is not that a racial remedy would itself violate Equal Protection. And of course the judge-made rule of self-restraint sometimes invoked cannot cancel the constitutional guarantee or prevent its enforcement. Any action taken to terminate or to redress a denial of equal

opportunity will necessarily and inevitably tend to constrict the opportunities previously enjoyed by the class unlawfully favored, so long as the opportunities are finite, and the innocence of the beneficiaries of discrimination cannot immunize the inequality in perpetuity.

Neither the white majority as a group nor any individual member can claim a vested right in the 99% of the law school places traditionally filled by whites while educational segregation was allowed to eliminate any minority competition, nor a proportional right in added seats or new schools, as here. Mere expectancies created by past wrongs do not warrant protection under the equitable doctrine.

In any event, the avoidance of detriment to innocent parties is not an absolute command, but a factor to be weighed in choosing among potentially available remedies to redress the harm done to the victim. Where the harm to the black is the life-long handicap of inferior education unlawfully segregated by state action, the immensity of the loss, sovereign immunity, and the Eleventh Amendment combine to leave specific relief as the only possible remedy. If the issue presented were judicial relief for minority applicants, therefore, a decree requiring a program identical to that adopted voluntarily by the medical school might have been appropriate despite the school's innocence of any direct discrimination, on the ground that it realized the segregative effect of the unlawful acts of earlier schools in the educational ladder. *Cf. Milliken v. Bradley*, 418 U.S. 717, 745, 748 (1975); *Keyes v. School District No. 1*, 413 U.S. 189, 210 (1973).

But this case presents no question of judicial remedies, and the limitations on federal judicial powers have no application. Whether a court could or should have ordered the University to take the action it took to remedy the minority's educational disadvantage is beside the point. The limits of judicial power are not the limits of government power in all its branches. Nor is any question presented here of legislative power to compel a resisting person to take such remedial action. The state of California bore no duty to provide medical education for all who might seek it, and in deciding how to allocate this scarce resource the state, through its appropriate agency, could voluntarily and properly take account of the need for "[r]eduction of the disparity . . . caused by the long history of discrimination . . .", as Congress chose to do in allocating social security benefits, and as this Court upheld in *Califano v. Webster*, ... U.S. ..... [97 S.Ct. 1192] (1977).

(3). The Choice and Scope of the Remedial Action Is Committed to Educational Discretion.

The majority below concedes that its color-blind better-qualified test may have the unfortunate effect of excluding minorities, but persists in restricting the possible goals of considering minority status to the future effects of the action. Had the court properly recognized that taking race into account is a lawful remedy for a past denial of Equal Protection, as in *Califano*, there would have been no occasion to explore other means to achieve some future goal. But the conclusion is wrong for other reasons.

Once it is recognized that a state may choose to take action to eliminate the consequences of racial segregation, and may seek to remedy its exclusionary effect in professional fields by increasing the enrollment of minority students to become doctors or lawyers, it

follows that the state interest, although racial, is legitimate if not indeed compelling as the court below concedes *arguendo*, and it remains to be explained why a direct racial remedy is forbidden so long as some indirect remedy is conceivable, as the majority opinion would command. Any indirect means, not framed in terms of the racial goal itself, will necessarily be *more* intrusive and overbroad, involving collateral costs and consequences extraneous to the specific purpose. When the objective of the state interest is *non*-racial, the use of a racial means is forbidden as unnecessarily intrusive upon the basic values of racial equality. But the basic principle simply requires that ends and means should match, and its application to this concededly legitimate racial objective requires—rather than forbids—a racial means of selection for medical school.

(a). *Alternative means.*

There is thus no valid legal principle calling upon a faculty to exhaust all conceivable alternative methods of increasing minority enrollment before the school will be allowed to proceed directly to the goal by taking minority status itself into account. It is therefore unnecessary to refute the assortment of speculative possibilities dignified by mention in the opinion below. To enlarge total enrollments in professional schools would demand a vast expenditure to increase capacity; medical and law school enrollments have already been doubled in the past fifteen years, and there is mounting concern that the nation is even now producing too many lawyers; if all law school applicants with a college degree were admitted, as was done a generation ago, total enrollment would be doubled again but only 5% of the added seats would be filled by blacks. Recruitment efforts directed specifically toward blacks have done their work and exhausted the supply, and general recruitment, racially

neutral as the court below would require, could only increase the volume of white applications. Special pre-professional training programs, to remedy the educational disadvantage built up over sixteen years of schooling, would require additional years of non-professional training, while the logical place for remedying any deficiencies specific to learning medicine or the law is in those professional schools themselves, in supplemental tutorial programs of the kind offered by many.

(b). *Disadvantage.*

A special program as suggested below for *all* disadvantaged applicants, without regard to race or minority status, would encounter first the formidable task of defining "disadvantage" in some artificial way to exclude the one disadvantage now most prevalent and most real: the disadvantage of being born black, or into a minority group subjected to segregated schooling and related discrimination. No social, economic, or cultural deprivation carries a comparable impact. To identify other disadvantages without expensive investigations and invasions of privacy, schools would have to rely upon the applicants' candor in self-report, a risky course when competitive pressures have already produced falsified credentials and forged recommendations from a few desperate applicants. The disadvantage most readily verifiable, after race and minority status, is economic; parents' income tax returns could perhaps be lawfully required and scrutinized, albeit with a major sacrifice of privacy. But the available evidence indicates that the use of economic disadvantage is not in fact a means to the end of increasing minority enrollment, and that its use would have no discernible effect in that direction. The Evans report analyzes the responses of law school

applicants for 1976 to the following question, included in the registration materials for the Law School Data Assembly Service offered by the Council and used by 146 of 157 law schools:

> "Would you describe yourself as coming from a low-income family background, such as from a family with a yearly income under $6,500 during your precollege years?"

Although blacks were twice as likely as whites to answer yes to this question, still more than three-fourths of the affirmative responses came from non-minority candidates.[29] Because discriminatory education operates within this poverty group, just as it operates generally, to depress the academic attainments of poor blacks in comparison with poor whites, a race-blind national policy reserving 15% of all law school seats for economically disadvantaged candidates would increase the share of total acceptances offered to blacks by less than one-half of one per cent,[30] and more than ninety per cent of the low-income background seats would be filled by whites.[31] The effect of such a program would be almost imperceptible in increasing minority enrollments, and it cannot be regarded as a feasible means to that end.

Upon analysis, it is plain that taking account of economic disadvantage is not only futile as a means toward the end of increasing minorities in medical and law schools and in those professions, but that it is a means to a different end entirely. Although the black are disproportionately poor, being black is not the same as being poor. A comparison of the data in the Evans report demonstrates that on measures of past

[29] Evans report, p. 59.

[30] Evans report, p. 62, note 18.

[31] Evans report, p. 62.

educational attainment, blacks are not just simply the equivalent of poverty-stricken whites.[32] Although low-income family background tends to lower college grades and test scores, that tendency is uniform across racial lines, so that the magnitude of the effect is approximately the same between poor and non-poor whites and poor and non-poor blacks.[33] It is also evident that the impact of poverty on educational attainment is not nearly so severe as the impact of minority status.[34] Thus the handicap of being black falls on rich and poor alike, and is wholly different from the handicap of being poor. Accordingly, the justification for a program of special admissions for the economically disadvantaged would have to be found in wholly different goals. The poor have not been compelled by unconstitutional laws to attend segregated and inferior schools. With a lesser handicap in educational attainment, they are now admitted in substantial proportions to law schools without the aid of special programs, and there is no evidence that they are

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[32] A comparison of Table 16, p. 36, with Table 25, p. 60, reveals that 64% of low-income white candidates had college grade averages above 2.50 and LSAT scores above 450, while only 24% of *all* black candidates (low-income or not) exceeded those combined levels.

[33] The fall-off in percentages above the various levels presented in Tables 16 and 25 of the Evans report, pp. 33 and 60, is consistent and roughly comparable in magnitude across the racial groups. Thus with low-income family backgrounds the whites above 2.50 and LSATs above 450 fell from 79% to 64%, while blacks fell from 24% to 18%; at 2.75 and 500, white percentages declined from 61% to 45%, and black percentages from 11% to 7%.

[34] More than half (3,339 of 6,643) of whites from low-income family backgrounds receive college grades and test scores in ranges above 2.50 and 450 where they would be accepted by use of the acceptance rates for all whites in those ranges. Evans report, p. 62, note 18. Only 11.5% (475 of 4299) of blacks, low-income or not, have grades and scores in ranges where they would be accepted under the same analysis. Evans report, p. 41.

underrepresented in the profession. In sum, as this Court has emphasized, economic inequality in education is wholly distinct from racial inequality. *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1975).

(c). *Scope of the remedy.*

Many law schools have chosen to take economic disadvantage into account in their admissions policies. Since that choice is clearly permissible under the opinion below, it should surely be permissible as well to take account of the vastly more severe educational handicap inflicted by racial segregation. But on the other hand, there is no reason why the law school's answer to the question of educational policy raised by economic disadvantage should be controlling on the very different question of whether admissions should take account of race. Law faculties are not obliged to cure all ills at once, and may choose, like Congress, to act against the continuing effect of racial discrimination in education without at the same time seeking to compensate for economic disadvantage neither inflicted by law nor prohibited by the Constitution.

In the exercise of that same power to determine educational policy, the schools should be allowed room for educational judgment in deciding what portion of their limited resources to allocate to the amelioration of whatever disadvantage they choose to take into account, that is, to decide not only whether, but also how much. The appropriation of resources to this policy, in competition with other educational needs and objectives, may be expressed in dollars or in percentages or in numbers of places in the class. The choice of terminology should carry no constitutional significance, approving a stated decision to commit 16% of the school's

instructional budget to training those who are educationally handicapped by prior segregated schooling, but condemning the same functional decision as an impermissible "quota" if expressed as a number of student seats. The legitimate fears engendered by that word have no valid foundation when "quota" is misused to characterize a rational planning decision, made in advance, to allocate a portion of educational resources to a legally permissible objective. While that decision is perhaps more commonly made after the applications have been submitted and evaluated comparatively, or as a by-product of individual admission decisions, the fact that a faculty chooses to make the decision on allocation prospectively, on reasonable projections, should not be constitutionally fatal.

II.

THE EXCLUDED NON-MINORITY APPLICANTS WERE NOT BETTER QUALIFIED.

The opinion below proceeds directly upon the premise that the only permissible standard for professional school admission is limited to the question of who is better qualified. There is no consideration of the cause of the minority's lower academic attainment, apparently for the unstated reason that it is no business of the law school to remedy harms it did not inflict. The standard of academic achievement, it holds, must be applied ruthlessly, if regretfully in the knowledge that minorities had the misfortune of being denied any fair chance to meet the standard. Any remedial allowance would improperly, it seems, depart from the notion that the sole purpose of law schools is to admit and train the best lawyers. The position, upon analysis, rests more upon *ultra vires* rules than upon the Constitution and Equal Protection.

As the dissenting opinion cogently demonstrates, there are other lawful purposes of admissions policies, notably the racial integration of medical schools and the medical

profession, which may be embraced within a permissible standard. Thus, even if minority applicants had not been handicapped in their educational achievement by illegal discrimination and segregation, reasonable programs to admit them would be wholly supportable. See, e.g., *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *United Jewish Organizations of Williamsburgh v. Carey*, ... U.S. ..... [45 U.S.L.W. 4221](March 1, 1977). These broader justifications for color-conscious policies are fully developed in other briefs, and will not be repeated here.

There remains the underlying assumption of the majority opinion below: that the white applicants displaced by minorities admitted were "better qualified". To analyze this assumption, we accept *arguendo* the corollary assumption that picking the better qualified is the only allowable purpose, and that remedial elements in an admission policy are forbidden along with other interests to be served.

A. The Opinion Below Would Force Undue Emphasis on Numerical Factors.

Although the majority below repeatedly disclaims and disavows any intention to require that admissions decisions must be made "by the numbers", affirmance would inevitably carry that precise effect. The opinion builds its conclusion that whites were "better qualified" through heavy reliance upon those numbers, noting that whites were not considered with college grade averages below 2.5 while a minority student was admitted at 2.11 in one year and another at 2.21 the next, pointing out that minorities' scores on the MCAT averaged below the 50th percentile, and remarking that "the combined numerical ratings of some students admitted under the special program were 20 to 30 points below Bakke's

rating." 18 Cal. 3d, 43. Against this emphasis, any departure from strict numerical ranking would incur grave risks of attack on a claim of preferential treatment, on the ground that the denied applicant with higher numbers was "better qualified". Any non-numerical, unquantified factor in admissions would be suspect, especially if its use resulted in the admission of any significant number of minorities. The threat is underscored by the majority's acceptance of the trial judge's finding that the medical school program for "disadvantage" was in reality a subterfuge for race. Reading the holding against its facts, admission committees would be forced to adhere to quantified factors, both as a matter of good faith compliance with the thrust and spirit of the decision below, and as a matter of cautious defensive strategy.

(1). Numerical Predictors Alone Do Not Determine Who Is Better Qualified.

For law schools, such reliance on numerical factors would be both irrational and counterproductive. The two quantitative measures generally available are college grades and LSAT scores. The numerical average of college grades must be adjusted, in reason, by judgment based on the rigor of the college's standards and the competition. The first-ranking student at one college, or in a less demanding major or department, might find himself in mid-class in a larger, tougher pond. Even if standards are equal between colleges, grade distributions may vary, so that a B-plus at one school means the top 10% and only the top half at another. LSAT scores must be interpreted in light of the applicant's record of performance on such objective tests in relation to his subsequent academic achievement, and in light of his familiarity with such objective tests, commonplace in some school systems but rarely used in

others. Most applicants take the LSAT only once, but many take it for a second or third time. Numbers without judgment and experience to appraise them may often mislead.

The opinion below echoes in its tenor the prevalent notion that such numbers fairly reflect who is better qualified. But law school admission is not a prize awarded for good grades, like a Phi Beta Kappa key, nor recognition conferred for outstanding achievement on the LSAT. College grades and scores are relevant to admission decisions not because they embody some general merit, but because they help to predict academic performance in law school. For obvious reasons, their utility is limited. College grades measure achievement in many disciplines, some of which, like art or music, may involve abilities and fields far removed from the study of law. The LSAT is a three-hour multiple choice test requiring no mastery of any particular body of knowledge, and represents a form of examination bearing little relationship to law school testing. Any rational attempt to predict probable law school performance on the basis of these numbers must also take account of unquantified information about the applicant, including such things as work experience which either might aid him in the study of law or explain lower college grades, his reasons for studying law and his motivation and dedication in college, and his probable adjustment to the stress and competition of law school. In this evaluation, minority status may itself be a predictor, since academic achievement is measured not only by how high the applicant stands but also by how far he has had to climb from where he began.

(2). Predictions of Law School Grades Are Approximations Useful Primarily to Exclude Probable Failures.

Predicting human behavior is far from accurate, and it is not surprising that these traditional numerical predictors provide only a rough approximation of an applicant's probable law school grades. Their predictive power has been measured in no less than 613 first-year law school classes, in so-called validity studies correlating each student's college grades and LSAT score against his actual law school grades. While the LSAT is somewhat more accurate than college grades, a weighted combination of the two is superior to either alone. The average coefficient of correlation in such studies is roughly 0.40, meaning that these predictors explain about 16% of the variability in the students' relative rankings. At this level of prediction, taking the predicted bottom fifth of the entering class as an example, about 40% will actually rank in the bottom fifth of the class when the law school grades are known, while 7% of them will rank in the top fifth of the class, and the remaining half will fall in the middle three fifths.[35] Extensive research with a variety of other potential predictors has failed to identify any more accurate system that can be verified by statistical methods of analysis.[36]

Despite their limits, such predictions are nearly essential in a situation where the available places in law school fall far short of the demand. In earlier times, when all could be accommodated, it was practicable if not wholly economic to give everyone his chance, and to

[35] Winterbottom et al., LSAT Handbook for Law School Deans and Admissions Officers p. 47, Law School Admission Council, Princeton, N.J. (1964)

[36] These research studies are compiled in three volumes entitled Law School Admission Council Sponsored Research, Vol. I, 1949-69; Vol. II, 1969-74; and Vol. III, Current.

make the real selection on the basis of actual first-year grades by failing out some 40%. Today, when the number who are qualified is a multiple of the seats, fairness requires prediction of probable failure in advance. For this purpose, the numerical predictors are more efficient than validity studies would indicate, since the accuracy of the predicted ranking necessarily diminishes as those accepted become more and more similar on the predictors. When most students enrolled have college grades at A-minus or better and high test scores, their comparative ranking on these numbers is less likely to be their comparative ranking in law school. Correcting for this restriction of range resulting from the use of these predictors in admissions, it appears that prediction of failure can be made with some confidence in the lower ranges of the applicant pool. The use of these predictors for this specific purpose is therefore vital, and abandonment would be foolhardy. But the fact that the use of numbers may be permissible does not require that it must be exclusive. The reception of admissible evidence does not thereupon require exclusion of all other relevant evidence.

B. Minority Background Is an Essential Factor in Determining Who Is Better Qualified.

Well above the range of probable failure, however, lies a much larger volume of applicants than the schools' total capacity. All are fully qualified to perform well on law school grades, and many are nearly indistinguishable on these measures. In this range, where most of the admissions work must be done, predictions of relative law school ranks are less accurate. But at the same time, they are less significant. Whether an applicant is predicted for the 40th or the 50th percentile of the class is a matter of no real consequence.

(1). Among Well Qualified Applicants, Selection Must Rest on Potential for Professional Contribution.

At this point, where predictions assure law school success, the purpose of the admission process undergoes a profound change from exclusion to selection, from predicting who will be a passing law student to predicting who will be a good lawyer. Here probable relative law school ranks count for little. It is apparent to anyone with a legal education that law school classes do not teach, law school examinations do not test, and law school grades do not measure, many of the abilities and qualities essential to the practice of law. Analytical capacities and a general knowledge of the body of law and its structure are essential, but beyond that taught law lie such qualities as the capacity for effective interpersonal communication, integrity and the responsibility to care for important interests entrusted to the lawyer, diligence, effectiveness in oral communication, empathy and understanding for the plight of a client, a temperament that is judicious and controlled, and a variety of other qualities. To predict actual performance in the legal profession, law school grades have minimal power, and numerical prelaw predictors even less. Although studies are under way to explore statistical ways to predict professional competence in performance,[37] the difficulties are enormous and the prospects

[37] The project is sponsored jointly by the American Bar Foundation, the National Conference of Bar Examiners, the Association of American Law Schools, and the Law School Admission Council. For a general description of the total project and a report of the first phase, see Carlson and Werts, *Relationship Among Law School Predictors, Law School Performance, and Bar Examination Results*, III Reports of LSAC Sponsored Research (1976).

for quick answers are not bright. One obstacle has been the problem of obtaining judicial cooperation. Meanwhile, law school admission committees must rely, like the courts, upon experience, common sense, and reasoned judgment.

(2). The Public Need for Lawyers Is the Appropriate Standard.

Law schools are established, funded, and supported not to provide a personal benefit for the chosen students but to serve the public interest by meeting the nation's need for lawyers and the work they do. There are many jobs to be done, and the law schools bear a duty to provide the different people who can and will fill the different positions. There is a need for some of scholarly inclination, to serve as teachers, appellate judges, writers, and specialists in certain demanding fields. Here law school grades help to predict what a student can and perhaps will do. For the jury lawyer, the family practitioner, the public servant, or the corporate counsel, different sets of abilities, qualities, and interests are needed.

As experience in medical education teaches, elevated standards do not necessarily mean better doctors for the profession as a whole, but may produce an oversupply of specialists and researchers. Like academic achievement, other accomplishments may help to predict the professional role a student will fill, and how well he will succeed. Non-academic experience, demonstrated interests, personal qualities, geographic and cultural ties are all relevant as predictors of the probable professional contribution, and how and where it will be made. To fill all the varying needs, law schools seek a wide diversity of backgrounds among their students.

To this end, an applicant's status as a member of a racial or ethnic minority is undeniably relevant in appraising his potential contribution to the profession. Whether or not he is better qualified cannot be answered without consideration of that most influential background. The court below thus abandoned reality and reasoned in a circle in insisting that who is better qualified for the profession can and must be determined without regard to race. As it is impossible to be blind to blindness, it is impossible to measure realistically whether an applicant is better qualified than another in a color-blind comparison. The important factor, of course, is not his race in any immutable genetic sense, but the unique experience and cultural ties which are inextricably interwined with perceived race in this country in his own lifetime. A black born and raised in France might be an interesting applicant, but his potential for contribution would be vastly different from that of a native American black who has lived through the tumult of the last 22 years. And at the same time, his potential for contribution is enhanced by the very fact that blacks and other minorities have been traditionally excluded from the legal profession; scarcity increases value.

(3). Diversity as an Element in Admissions Policy Serves Both Governmental and Educational Purposes.

The inescapable relevance of race to determining who is better qualified for professional contribution is perhaps most clearly evident in the profession of the law. Law is government, and lawyers are involved in government and its processes to some degree in every branch of practice and every professional position. The

values of fair representation in government run long and deep, and geographic groupings are not the only permissible considerations in allocating political representation in the legislative process. As this Court has recently confirmed, race can also be taken into account, despite the absence of a previous constitutional violation. *United Jewish Organizations of Williamsburgh v. Carey*, ... U.S. ..... [45 USLW 4221] (March 1, 1977).

The law is by far the most common profession of the nation's legislators. In the national Congress, two-thirds of the Senators and half the members of the House of Representatives are lawyers. In the state legislatures, some 22% of the members are lawyers.[38] To exclude minorities from the profession is *pro tanto* to exclude them from the legislative process. Of course all judges must be lawyers, and the layman might find it difficult to comprehend why it should be unconstitutional systematically to exclude blacks from the jury box but not from the bench. On governmental commissions and boards, the values of diversified representation are consistently recognized by law and in practice. To limit the number who may be appointed from one political party does not, of course, set an unlawful quota on political majorities or minorities, and does not constitute discrimination forbidden by the First Amendment when all groups are fairly represented, even when a candidate is excluded though better qualified, solely because he belongs to the wrong group or political party.

In short, there is a vast gulf between the use of race or any other suspect classification in pursuit of the values

[38] Occupation Profile of State Legislators, p. 22, Insurance Information Institute, New York (1977) (1,681 of 7,564 state legislators are lawyers, the largest occupational group represented).

of diversity in serving the public and its needs, and the use of the classification to limit diversity. Diversity serves a special function in education, to prepare students for life in a pluralistic society, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971). In legal education, built upon dialogue, debate, and the clash of conflicting opinion, diversity makes a unique contribution to the education of *all* students, majority and minority alike. *Sweatt v. Painter*, 339 U.S. 629 (1950). To give special consideration to an applicant who is a nun does not constitute a preference on religious grounds; to a football captain, sex discrimination; to a labor organizer, political discrimination; to a former high school principal, age discrimination; to a South African national, alienage discrimination; or to a bi-lingual Chicano, language discrimination. In all such cases, the use of such a factor to exclude either all who have it or all who lack it would raise grave constitutional questions. But to use such personal characteristics as one factor in an admissions decision, in quest of diversity for its educational values, and for its role in assuring that the public need for legal services will be met in all areas, is fundamental and essential to the educational mission. In every case there will be a disappointed applicant who can claim that he was excluded from the last available seat by the "preference" afforded. And in every case, the factor will potentially operate in both directions, to serve as a positive element in the decision when the particular background or experience is unrepresented in the class, and in the negative when it is already overrepresented. Unless educational policy is to become the exclusive province of the judiciary, positive use cannot be held an unconstitutional preference, nor negative use an invalid quota.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Supreme Court of California should be reversed.

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APPENDIX

Excerpt from:

Applications and Admissions to
ABA Accredited Law Schools:
An Analysis of National Data for the Class Entering
in the Fall 1976

Franklin R. Evans
Educational Testing Service

May 1977

pp. xiv-xviii.

Results of the Study

The following findings are indicated by the analyses of the data in this study.

1. In the past 15 years the number of enrolled first-year law students in ABA approved schools has nearly doubled. During this same period, the number of persons sufficiently interested in pursuing a legal education to take the LSAT has more than tripled, resulting in increased competition among candidates for the available spaces in the national law schools. It is estimated that the number of aspirants who are not able to gain admission to an ABA approved law school has increased eight-fold during this period. Closely tracking this increase in competition for admission has been marked elevation in the LSAT scores and UGPA records of enrolled first-year law students.

2. During the past 15 years, while total first-year enrollments doubled, the percentage of both women students and of black and Chicano minority students has increased six-fold: in the case of women students, from less than 4% to 25% of the total student bodies, and in the case of black and Chicano students combined from approximately 1% to more than 6% of the first-year student bodies.

3. Women applicants achieve approximately the same scores as men on the LSAT, and have somewhat higher college grades. Their rates of acceptance to law school are in close parallel with the rates for men in the same ranges of LSAT scores and UGPA records.

4. Data from sources outside this study suggest that slightly larger percentages of blacks and Chicanos than white college graduates apply to law school. In passing upon applications, the nation's law schools accept a significantly larger percentage of whites (59%) than of blacks

(39%) or Chicanos (47%). As a result, the first-year law school enrollment percentages for these minorities in the study correspond directly with their reported percentages among 1974 baccalaureate recipients: 5.3% for blacks and 1.36% for Chicanos.*

5. Viewed as a group, the black and Chicano applicants to the law schools in this study achieved significantly lower LSAT scores and UGP averages than did non-minority applicants. Although the rate of acceptance for majority group applicants was higher over all, at any specific level of LSAT and UGPA combined, blacks and Chicanos were accepted at higher rates than whites. In the aggregate, the nation's law schools have reported that these higher rates of acceptance are made possible by knowledge of the applicant's minority background. It seems clear that the background of a black or Chicano applicant is a positive factor in the total process of admission to the aggregate of the nation's law schools.

6. Although the LSAT scores and UGPA records of accepted blacks and Chicanos are lower, on the whole, than the corresponding numerical measures for accepted non-minority applicants, these accepted minority students cannot for this reason be regarded as less than fully qualified for law study. They rank, on these predictors,

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* Blacks and Chicanos constituted 12.65% and 2.75%, respectively, of the total national population in the age range (21-25) appropriate for entry into law school in 1976, according to census data. However, the cumulative effects of lower rates of high school graduation, college entry, and college completion for these minority groups operated to reduce their respective percentages of the national total of baccalaureate recipients to approximately 5.3% for blacks and 1.3% for Chicanos in 1974, the most recent year studied. See, Atelsek and Gomberg, Bachelor's Degrees Awarded to Minority Students, 1973-74, *Higher Education Panel Report*, American Council of Education 1977, 24, p. 6.

equal to or higher than the average of all law students enrolled 15 years ago.

7. If the nation's law schools were to adopt an admissions policy taking no account of minority backgrounds of blacks and Chicanos, a majority of the students from those groups now admitted and enrolled would be excluded. If blacks and Chicanos were accepted at the rates for non-minorities at the same levels of LSAT and UGPA, the reduction in their enrollments would be 60% and 40%, respectively. If numerical predictors were employed exclusively for all applicants, the resulting reductions would be 76 to 78% for blacks and 45 to 48% for Chicanos. When law schools were asked to estimate the number of those minorities who would have been admitted if their minority status was unknown, they estimated reductions of 80% for blacks and 70% for Chicanos. The percentage of blacks among first-year law students would drop to between 1% and 2% from the current 5.3%, and the percentage of Chicanos would fall to between 0.4% and 0.8% from the current 1.36%.

8. At the law schools which are most selective in terms of LSAT and UGPA and at those which have been ranked by other studies as the leading 10%, the adoption of an admissions policy taking no account of the minority backgrounds of blacks and Chicanos would reduce the percentage of those minorities enrolled to a minor fraction of 1%. The national impact of this reduction would be significant, since these same schools also rank highest in financial aid resources available for scholarship assistance, an essential for most minority students, and since they currently enroll 14% of all minority law students.

9. Low-income family background, as a self-reported measure of disadvantage, does not eliminate the disparity in LSAT and UGPA between non-minorities and blacks or Chicanos. If 15% of law school places were reserved for such low-income candidates, without regard to minority background, less than 10% of these disadvantaged acceptances would be blacks and Chicanos, and the percentage of blacks and Chicanos among all first-year law students would be increased by less than 1% over their percentage when neither low-income nor minority backgrounds are taken into account.